**No. 07-3550**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| **ELIZABETH BLACK,** | ) | |
| | ) | |
| **Plaintiff/Appellant,** | ) | **Appeal from the United States District** |
| | ) | **Court for the Eastern District of Wisconsin** |
| **v.** | ) | |
| | ) | **No. 04 C 1230** |
| **LONG TERM DISABILITY** | ) | **Hon. Lynn S. Adelman** |
| **INSURANCE sponsored by** | ) | |
| **Milwaukee World Festival, Inc. as** | ) | |
| **Plan Administrator,** | ) | |
| | ) | |
| **Defendant/Appellee.** | ) | |

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**BRIEF OF THE DEFENDANT / APPELLEE**

**LONG TERM DISABILITY INSURANCE SPONSORED BY MILWAUKEE WORLD FESTIVAL, INC. AS PLAN ADMINISTRATOR**

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| **Plan Administrator,** | ) | |
| | ) | |
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**DEFENDANT'S CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The following information is submitted pursuant to Cir. R. 26.1 and Fed. R. App. P. 26.1:

1. Represented Parties: Long Term Disability Insurance.

2. Law firms whose partners or associates have appeared for the defendant: Smith, von Schleicher & Associates.

3. Other persons known to have an interest in the outcome:

   (i) Standard Insurance Company (the insurer and claims administrator of Long Term Disability Insurance);

   (ii) Milwaukee World Festival, Inc. (the sponsor and plan administrator of Long Term Disability Insurance);

   (iii) Publicly held company that owns 10% or more of the defendant's stock: None.

Signature of Counsel of Record:

_____

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## JURISDICTIONAL STATEMENT

The Jurisdictional Statement of the plaintiff, Elizabeth Black, is complete and correct.

## ISSUES PRESENTED FOR REVIEW

Whether the decision of the Long Term Disability Insurance Plan's claims administrator, Standard Insurance Company ("Standard"), to decline Elizabeth Black's claim for disability benefits under ERISA was reasonable and permissible, and not arbitrary and capricious.

## STATEMENT OF THE CASE

The plaintiff, Elizabeth Black ("Black"), served as the executive director of Milwaukee World Festival, Inc. ("MWF"), a nonprofit organization that operates Milwaukee's Summerfest. As an employee of MWF, Black participated in MWF's Long Term Disability Insurance ("Plan"), which provides disability insurance coverage to employees of MWF.

On August 6, 2003, Black submitted a disability claim to Standard, the Plan's insurer and claims administrator. Black claimed that the stress of her job raises her blood pressure to uncontrollable levels and places her at risk of developing potentially life-threatening heart complications. On January 28, 2005, after providing Black with a full and fair review of her claim including an administrative appeal, Standard declined Black's application for disability benefits, thereby exhausting Black's administrative remedies under ERISA and the Plan.

On December 22, 2004, Black filed a lawsuit in the United States District Court for the Eastern District of Wisconsin, seeking disability benefits under the Plan pursuant to §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), and asserting a putative class action claim against Standard under §502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3). Black subsequently voluntarily dismissed the class action allegations against Standard, and the case proceeded to judgment on Black's remaining §502(a)(1)(B) benefit claim.

On September 27, 2007, the district court entered summary judgment in favor of the Plan. Black filed a timely notice of appeal on October 17, 2007. The jurisdiction of the United States Court of Appeals for the Seventh Circuit is based on 28 U.S.C. §1291 and Rules 3 and 4 of the Federal Rules of Appellate Procedure.

## STATEMENT OF FACTS

For twenty years, Elizabeth Black served successive five-year terms as the executive director of MWF. As executive director, Black managed MWF's daily operations, including fundraising, budgeting, community liaison, vendor contracts, supervising 45 full-time employees and numerous festival volunteers, and implementing the decisions of MWF's board of directors. (R. 48: Def. LR56, ¶¶ 6, 64). Black reported to MWF's president (Frank Busalacchi in 2002, and Howard Schnoll in 2003). Black's final five year term as executive director ran from January 1, 1999 to December 31, 2003, when her employment contract expired. (R. 48: Def. LR56, ¶ 6).

Although Black clearly desired another five-year term as executive director, the majority of MWF's board of directors desired new leadership. Summerfest had become a vital tourist destination and an important source of revenue for Milwaukee, but Black's divisive management style had alienated community leaders. In late July 2003, the personnel committee of MWF's board of directors voted not to renew Black's employment contract. (R. 48: Def. LR56, ¶ 17). One week later, on August 6, 2003, Black informed MWF's president that she was disabled and no longer able to fulfill her responsibilities as executive director. (R. 48: Def. LR56, ¶ 27). That same day, Black submitted a disability claim to Standard, in which she claimed to be disabled due to "multiple aortic aneurysms" and high blood pressure. (R. 48: Def. LR56, ¶ 7).

## The History of Black's Medical Condition

An aortic aneurysm is an abnormal enlargement in the wall of the aorta, the body's largest artery. Roughly the diameter of a garden hose, the aorta extends through the chest (the thoracic aorta) and abdomen (the abdominal aorta), where it divides into blood vessels that supply each leg.[1] Most aortic aneurysms are small, slow-growing and rarely rupture. Large, fast-growing aneurysms present an increased risk of rupture. Treatment varies from watchful monitoring to surgery, depending on the size and growth rate of the aneurysm.[2]

While filming a television commercial for a health clinic in January 2001, Black obtained a cardiac CT scan, which detected a possible thoracic aneurysm. (R. 48: Def. LR56, ¶ 7). A Milwaukee area cardiologist, David Slosky, M.D., subsequently found an area of "marked enlargement" in Black's ascending thoracic aorta. Dr. Slosky also detected an area of enlargement "to a lesser degree" in Black's descending thoracic aorta. (R. 48: Def. LR56, ¶ 40). Dr. Slosky recommended surgery to repair both aneurysms, and prescribed medication (Altace and Atenolol) for blood pressure control. (R. 48: Def. LR56, ¶ 40).

Black obtained a second opinion from Bruce Lytle, M.D., a cardiac surgeon at the Cleveland Clinic. Dr. Lytle recommended surgical repair of the larger aneurysm in the ascending thoracic aorta, and watchful monitoring (rather than surgery) of the smaller aneurysm in Black's descending thoracic aorta. (R. 48: Def. LR56, ¶ 28). On March 9, 2001, Dr. Lytle successfully surgically repaired Black's ascending aortic aneurysm with a Dacron patch. Five days later, Black was discharged from the Cleveland Clinic. (R. 48: Def. LR56, ¶ 28). On discharge, Dr. Lytle measured the maximum diameter of Black's descending thoracic aorta (the

[1] See www.mayoclinic.org/aortic-aneurysm/ and www.americanheart.org/ presenter. jhtml?identifier=4455 (March 6, 2009). For an illustration, see www.slrctsurgery.com /Thoracic%20aortic%20aneurysms.htm (March 6, 2009).

[2] See www.mayoclinic.com/health/aortic-aneurysm/DS00017 (March 6, 2009).

location of the smaller aneurysm) at 4.7 centimeters. Dr. Lytle restricted Black's activities for six weeks to allow for healing, reduced her sodium intake, and recommended follow-up with her local cardiologist, Dr. Slosky, and with Dr. Brian Griffin of the Cleveland Clinic. (R. 48: Def. LR56, ¶ 28).

Six weeks after surgery, Black resumed her duties as executive director, working temporarily curtailed hours. (R. 48: Def. LR56, ¶¶ 7, 19). By the summer of 2001, Black acknowledged that she had "recovered well enough to run the festival to a record year that summer." (R. 48: Def. LR56, ¶ 19). After the surgery, Black had no complications related to the ascending thoracic aorta, which the parties agree has been successfully repaired. Rather, Black claims to be disabled due to the risk of rupturing the smaller aneurysm in her descending thoracic aorta.

**Dr. Slosky's Monitoring of Black's Hypertension**

After returning to work in the summer of 2001, Black saw Dr. Slosky approximately once a year for regular monitoring of her blood pressure. Between 2001 and 2004, Black's blood pressure readings ranged between normal to moderate levels of hypertension. [3]

On August 29, 2001, Dr. Slosky recorded Black's blood pressure at 150/90, which reflects only mild hypertension. (R. 48: Def. LR56, ¶ 42). During that examination, Dr. Slosky noted that Black was "asymptomatic" and that her cardiac status was "stable" except for "poorly

[3] The Merck Manual (www.merck.com/mmhe/sec03/ch022/ch022a.html (March 6, 2009)) provides the following classification of blood pressure ranges:

| Blood Pressure | Systolic | Diastolic |
|---|---|---|
| **Normal** | Below 130 | Below 85 |
| **High-Normal** | 130-139 | 85-89 |
| **Mild** | 140-159 | 90-99 |
| **Moderate** | 160-179 | 100-103 |
| **Severe** | 180 or higher | 110 or higher |

controlled hypertension." (R. 48: Def. LR56, ¶ 42). Dr. Slosky increased Black's dosage of Altace and recommended follow-up in one year.

During the next annual examination on July 11, 2002, Dr. Slosky recorded Black's blood pressure at 168/88 (right arm) and 170/82 (left arm), which reflects moderate hypertension. (R. 48: Def. LR56, ¶ 43). Again, Dr. Slosky opined that "from a cardiac standpoint [Black] is asymptomatic…." (R. 48: Def. LR56, ¶ 43). Dr. Slosky recommended further follow-up in one year.

At the next annual examination on July 3, 2003 (just weeks before MWF's personnel committee voted not to renew Black's employment contract), Dr. Slosky found Black's blood pressure to be "normal" at 122/78 and her cardiac status "asymptomatic." (R. 48: Def. LR56, ¶ 44). Dr. Slosky concluded:

> From a cardiac standpoint, I feel that we finally achieved some stability, however, I have recommended that she make an attempt to further decrease the stress in her life, as that would help in decreasing the lability of her blood pressure.

(R. 48: Def. LR56, ¶ 44). Approximately one month later, on August 6, 2003, after learning that her employment contract would not be renewed, Black submitted a disability claim to Standard.

On October 29, 2003, Dr. Slosky found Black's blood pressure to be mildly elevated at 148/90, which he treated by temporarily increasing her blood pressure medication. Dr. Slosky advised Black to "reduce the stress in her life, if possible." (R. 48: Def. LR56, ¶ 46).

By May 27, 2004, Black's blood pressure responded to the adjustments in medication and returned to normal at 130/74. Dr. Slosky concluded: "[w]e have finally achieved reasonable blood pressure control with her current medical regimen." (R. 48: Def. LR56, ¶ 49).

**Dr. Griffin's Monitoring of Black's Descending Aortic Aneurysm**

After her surgery in March 2001, Black returned to the Cleveland Clinic bi-annually for monitoring of her descending aortic aneurysm. Medical records from the Cleveland Clinic's Dr. Griffin reflect that since March 2001, Black's descending aortic aneurysm remained stable. An MRI obtained on November 29, 2001 measured the maximum diameter of Black's descending aorta at 4.7 centimeters. (R. 48: Def. LR56, ¶ 29). An MRI obtained on May 13, 2002 noted only a "*mildly* increased" size of the descending aorta (to 5.0 centimeters).[4] (R. 48: Def. LR56, ¶ 30) (emphasis added). Dr. Griffin found no evidence of dissection (or bleeding).[5] Subsequent MRIs obtained on October 31, 2002, February 25, 2003, September 15, 2003 and March 30, 2004 confirmed the "stable" appearance of the thoracic aorta with no further increase in the diameter of Black's descending aortic aneurysm. (R. 48: Def. LR56, ¶¶ 31-33).

**Black's Pursuit of Another Five-Year Term as Executive Director**

Shortly after the success of Summerfest 2001, Black sought to renew her employment contract to serve another five-year term as executive director, even though her current employment contract did not expire until December 31, 2003. MWF deferred Black's contract proposal for later consideration in 2002 by MWF's president-elect, Frank Busalacchi. (R. 48: Def. LR56, ¶ 20; R. 50 & 51: STND655-1043 – 1044, STND655-1098, STND655-1110 - 1111).

[4] The descending aorta does not maintain a static size in any person, healthy or otherwise. On average, the descending aorta grows at the rate of 0.2 cm. per year. See www.slrctsurgery.com/Thoracic%20aortic%20aneurysms.htm#_Can_anything_prevent_their%20growth? (March 6, 2009).

[5] Dissection occurs when there is bleeding along the wall of the aorta. See www.nlm. nih.gov/medlineplus/ency/article/000181.htm (March 6, 2009).

After Mr. Busalacchi assumed office in 2002, Black's relationship with senior MWF officials and community leaders (including Milwaukee's Mayor) grew increasingly strained.[6] In November 2002, Black had her attorney, Stephen Kravit, prepare another proposal to renew her employment contract. (R. 48: Def. LR56, ¶ 18). Instead of submitting the proposal to Mr. Busalacchi, however, Black circumvented MWF's president and attempted to place her proposal directly on the meeting agenda for a vote by MWF's board of directors. Mr. Busalacchi formally reprimanded Black for attempting to bypass his authority. (R. 48: Def. LR56, ¶ 24).

On December 2, 2002, Black issued a letter to MWF's general counsel, Mike Kelly, accusing Mr. Kelly, Mr. Busalacchi and others within MWF's senior management of harassment, verbal abuse, and plotting "to move me out the door by letting my current contract expire." (R. 48: Def. LR56, ¶ 19). Importantly, Black acknowledged in her letter that she was "fully functional" and that her medical condition was unaffected by the everyday stress of her duties as executive director. In fact, Black claimed that her heart condition reacted only to the "unnecessary stress" of "degrading, disparaging and harassing conduct…." (R. 48: Def. LR56, ¶¶ 19-20). At the conclusion of her letter, Black demanded an end to the harassment and renewal of her employment contract:

> I am asking for a five year contract. I am asking to be treated in a non-threatening, non-harassing way, and in a way that does not add unnecessary stress.

(R. 48: Def. LR56, ¶ 20). Black informed MWF that she would file a lawsuit alleging discrimination and harassment if her employment demands were not satisfied. (R. 48: Def. LR56, ¶ 16). Due to Black's allegations of harassment, MWF retained the law firm of Godfrey

[6] See http://www.milwaukeeworld.com/html/kass/050703-2.php (March 4, 2009) (reporting political tensions between Black and Milwaukee's Mayor Norquist, including an incident in which Black publically called the Mayor a Nazi).

& Kahn to perform an independent investigation. Godfrey & Kahn, in its April 2, 2003 Investigation Report, found that there was no substance to Black's allegations of unlawful harassment and discrimination. (R. 48: Def. LR56, ¶ 25).

In the fall of 2002, Black asked her treating physicians to prepare letters to her attorney specifically for use during her contract negotiations, advising senior MWF officials of the health risks of harassment and verbal abuse. Dr. Griffin, in his November 20, 2002 letter, stated:

> Stress, particularly in the form of verbal abuse, is very deleterious for her blood pressure control. It is most important that this should be avoided.

(R. 48: Def. LR56, ¶ 21). Similarly, Dr. Slosky, in his December 6, 2002 letter, stated:

> Her blood pressure is quite labile and reactive to stressful conditions. It is particularly sensitive to acute and direct confrontation. This type of situation should be carefully avoided. The patient should not be subject to harassment of this kind.

(R. 48: Def. LR56, ¶ 22). Black even prevailed upon Dr. Eric Maas, a neurologist friend whom she had seen only once in 2002 (for an unrelated "mild head injury" and not for cardiac issues) to weigh in on the contract debate.[7] Dr. Maas stated in his letter to Black's attorney:

> It is my medical opinion that any undue stress should be minimized given her medical history particularly with regard to hypertension and her vascular disease. I believe this is a reasonable request that these factors be taken into account in planning these [employment contract] negotiations.

As part of the evaluation of Black's contract proposal, MWF's president and board of directors engaged Moira Kelly, a professor at Marquette University and principal of Kelly Consulting, to survey employee opinion and morale. Ms. Kelly concluded that the majority of MWF employees viewed Black as a divisive figure and an ineffective leader. (R. 48: Def. LR56, ¶ 26). Consequently, in late July 2003, MWF's personnel committee voted not to renew Black's

[7] After seeing Dr. Maas one time in 2002, Black did not bother to see Dr. Maas again until August 31, 2004. (R. 48: Def. LR56, ¶¶ 23, 59).

employment contract after her term as executive director expired on December 31, 2003.[8] (R. 48: Def. LR56, ¶ 17).

One week later, on August 6, 2003, Black informed MWF's president "with sincere sadness and regret" that she was disabled and no longer able to perform her duties as executive director (except for "minor ceremonial and public relations" duties). Black stated in her resignation letter:

> I have been advised by my Cleveland Clinic doctors, Dr. Lytle and Dr. Griffin, and by my local treating cardiologist, Dr. Slosky, that I am disabled and must leave the important duties and the accompanying pressure and stress of this job behind, or I may not survive.

(R. 48: Def. LR56, ¶ 27). Contrary to Black's statements, the medical records of Drs. Lytle, Griffin and Slosky prior to the date of Black's resignation fail to document any opinion that Black was disabled or recommendation that she must cease working. To the contrary, on July 3, 2003—which was the last medical examination prior to her resignation—Dr. Slosky found Black's blood pressure to be normal and her cardiac condition to be stable. (R. 48: Def. LR56, ¶ 44).

**Standard's Evaluation of Black's Disability Claim**

On August 6, 2003, the same day as her resignation, Black submitted a disability claim to Standard, in which she claimed to be unable to work due to multiple aortic aneurysms and high blood pressure. (R. 48: Def. LR56, ¶ 7). She subsequently submitted an Attending Physician Statement ("APS") and cover letter from Dr. Griffin dated September 15, 2003. In the APS, Dr. Griffin opined that Black should cease working due to poor blood pressure control and "severe

[8] The personnel committee, which is comprised of four members of the board of directors, voted 3-to-1 in favor of not renewing Black's contract. The decision of the personnel committee was upheld by a vote of the full board of directors on September 12, 2003. (R. 48: Def. LR56, ¶ 17).

stress." (R. 48: Def. LR56, ¶ 34). In his accompanying cover letter, Dr. Griffin opined that Black should avoid "any stressful managerial position" and "work that requires her to be under media scrutiny or where she needs to meet time deadlines." (R. 48: Def. LR56, ¶ 35).

Nearly one year later, on July 22, 2004, Black submitted to Standard a "to whom it may concern" letter signed by Dr. Slosky. (R. 48: Def. LR56, ¶ 50). In the letter, Dr. Slosky described Black's historical blood pressure readings as "increasingly labile." He opined that "reduced stress leads to more easily controlled blood pressure, which would hopefully maintain stability of the aneurysm." (R. 48: Def. LR56, ¶ 50).

During the administrative appeal, Black engaged an attorney who added "fatigue" and "cognitive impairments" to Black's list of disabling medical conditions. (R. 48: Def. LR56, ¶ 11). Black submitted psychiatric counseling notes (liberally redacted) from her psychiatrist, Michael Deeken, letters from her family members and friends describing her as extremely fatigued, and the results of neuropsychological testing performed on August 20, 2004 by Thomas Hammeke, Ph.D. (R. 48: Def. LR56, ¶ 56).

Standard reviewed all of Black's medical records and consulted five independent physicians who also reviewed the medical records. Standard consulted (i) Theodore Kleikamp, M.D., a physician Board certified in internal medicine, (ii) Ronald Fraback, M.D., a physician Board certified in internal medicine and geriatrics, (iii) Kent Williamson M.D., a Board certified cardiologist and vascular surgeon with extensive experience treating aortic aneurysms, (iv) Storm Floten, M.D., a Board certified cardiologist, thoracic surgeon and a professor of surgery, and (v) Esther Gwinnell, M.D., a physician Board certified in psychiatry. (R. 48: Def. LR56, ¶¶ 69-101). These independent physicians all concurred that Black's hypertension was adequately

controlled with medication, that Black's descending aorta was stable and essentially unaffected by the stress of her occupation, and that Black was not disabled.

Dr. Kleikamp was the first physician consulted by Standard. Dr. Kleikamp acknowledged that stress can raise one's blood pressure, and that high blood pressure can effect the progression of an aortic aneurysm. (R. 48: Def. LR56, ¶ 73). Dr. Kleikamp noted, however, that the cardiac MRI and CT scans showed that Black's aortic aneurysm has been stable and essentially unchanged since March 2001. (R. 48: Def. LR56, ¶ 70). Dr. Kleikamp concluded that the medical records failed to document that Black's condition was disabling. (R. 48: Def. LR56, ¶ 71).

The second consulting physician, Dr. Fraback, concurred with Dr. Kleikamp's opinions. Dr. Fraback further recommended that Standard consult a cardiologist. (R. 48: Def. LR56, ¶ 74).

Pursuant to Dr. Fraback's recommendation, Standard consulted Dr. Williamson, a cardiologist and surgeon who reviewed Black's entire file. While Dr. Williamson acknowledged that stress can increase blood pressure, he opined that, with appropriate blood pressure medication, stress would have "*minimal impact* on the growth rate or rupture potential of the existing descending thoracic aortic aneurysm." (R. 48: Def. LR56, ¶ 82) (emphasis added). Dr. Williamson opined that Black's descending thoracic aorta has "remained stable" since 2001 and has not been affected by the stress of her occupational duties. (R. 48: Def. LR56, ¶¶ 79-88). Indeed, Dr. Williamson noted that Black's recorded blood pressure readings were not within a range that would increase the risk of an aortic rupture:

> I have considered stress and blood pressure control in formulating an opinion regarding Ms. Black's risk for aneurysm rupture. At this time there is no solid evidence that blood pressures within the range recently reported are linked to an increased risk of rupture of thoracic aortic aneurysms such as Ms. Black's.

(R. 48: Def. LR56, ¶ 87). Dr. Williamson concluded that Black's hypertension and thoracic aneurysm did not prevent her from working as executive director. (R. 48: Def. LR56, ¶¶ 79-88). Dr. Williamson recommended further consultation with Dr. Floten, a cardiologist and thoracic surgeon.

Dr. Floten opined, based on his review of the entire medical file, that Black's thoracic aneurysm has been unaffected by the stress of her job: "I do not believe her condition has been affected by the stress of her job. The descending aorta has not enlarged significantly in the last three years." (R. 48: Def. LR56, ¶ 91). Dr. Floten concluded that Black was not disabled by her medical condition:

> I do not believe that the patient's aortic condition and/or hypertension would prevent her from working…. I do not believe stress of any job or an eight hour workday should alter the progression or lack of progression of her medical problem.

(R. 48: Def. LR56, ¶ 90).

Finally, Standard consulted a psychiatrist, Dr. Gwinnell, who also reviewed Black's medical file. Dr. Gwinnell opined that Black's claim of disabling fatigue and cognitive difficulties were not supported by the medical records. Specifically, Dr. Gwinnell noted that the medical records of Drs. Slosky, Griffin and Deeken failed to document any ongoing symptoms of fatigue or cognitive difficulties. (R. 48: Def. LR56, ¶¶ 93-101). Dr. Gwinnell opined, based on the neuropsychological testing of Thomas Hammeke, that "for the most part Ms. Black scored in the average to above average range." (R. 48: Def. LR56, ¶ 100). Dr. Gwinnell concluded that the documentation failed to establish that Black was disabled by fatigue or cognitive deficits on the August 6, 2003 claimed date of disability or at any time prior to the termination of her employment contract on December 31, 2003. (R. 48: Def. LR56, ¶¶ 93-101).

On January 28, 2005, Standard notified Black of its final decision to decline her disability claim, thereby exhausting her administrative remedies under ERISA and the Plan.

## SUMMARY OF THE ARGUMENT

The core requirements of a full and fair review under ERISA include knowing the evidence on which the administrator relied and having the administrator reach a final decision that considers the relevant evidence. *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 360 F.3d 681, 690 (7th Cir.), *cert. denied*, 543 U.S. 869 (2004) (citing *Halpin v. W. W. Grainger, Inc.*, 962 F.2d 685, 689 (7th Cir. 1992). Black accuses Standard of flouting these core requirements by disregarding important aspects of her disability claim. Black contends that Standard failed to consider the effect of stress and hypertension on her aortic aneurysm, and dismissed evidence of impaired cognitive function and fatigue without any evaluation whatsoever.

The administrative record, however, is replete with Standard's in-depth consideration of all aspects of Black's disability claim. Standard consulted five highly qualified physicians who thoroughly evaluated Black's medical records and who reasonably determined that Black was at minimal medical risk of rupturing her descending aortic aneurysm. These consulting physicians expressly considered the impact of stress and hypertension on Black's aortic aneurysm, as well as her claimed symptoms of fatigue and cognitive difficulties.

"Many persons with serious heart conditions work at stressful jobs for years without ill effects. Think of President Eisenhower, Vice President Cheney, and Associate Justice Stevens." *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 409 (7th Cir. 2004). Standard reasonably determined that Black falls within the same category. The medical opinions of Standard's consulting physicians provide a rational basis for Standard's decision to decline Black's disability claim.

Black, at best, raises debatable medical points and disagrees with the medical judgment of Standard's consulting physicians, which is insufficient to warrant judicial reversal of Standard's benefit decision under the highly deferential arbitrary and capricious standard of review.

## ARGUMENT

### I. Standard Of Appellate Review.

The district court's grant of summary judgment pursuant to Fed. R. Civ. P. 56 is reviewed on appeal *de novo*. *Reich v. Ladish Company, Inc.*, 306 F.3d 519, 522 (7th Cir. 2002) (citing *Anslett v. Eagle-Picher Indus., Inc.*, 203 F.3d 501, 503 (7th Cir. 2000)).

Judicial review of an ERISA administrator's benefit determination is *de novo* unless the plan documents grant discretionary authority to the administrator. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). When the plan documents confer discretionary authority, courts review the administrator's benefit determination by applying the "arbitrary and capricious" standard. *Id.* at 111; *Williams v. Aetna Life Ins. Co*., 509 F.3d 317, 321 (7th Cir. 2007). Because the Plan grants discretionary authority to Standard, the applicable standard of judicial review is the arbitrary and capricious standard. Under this highly deferential standard, "the administrator's decision will only be overturned if it is 'downright unreasonable.'" *Williams*, 509 F.3d at 321 (quoting *Tegtmeier v. Midwest Operating Engineers' Pension Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004); *Carr v. Gates Health Care Plan*, 195 F.3d 292, 295 (7th Cir. 1999), *cert. denied*, 529 U.S. 1068 (2000)).

### II. The Plan Grants Discretionary Authority To Standard.

An ERISA plan confers discretionary authority when its language conveys that the administrator "has the latitude to shape the application, interpretation, and content of the rules in each case." *Diaz v. Prudential Ins. Co. of America*, 424 F.3d 635, 637-638 (7th Cir. 2005).

Although the Seventh Circuit has suggested certain "safe harbor" language as sufficient to confer discretionary authority, that language is not obligatory. *Id.* at 637. The court has acknowledged that it "could imagine an almost infinite set of verbal formulations" that would be sufficient to confer discretion. *Id.* at 638. The absence of the word "discretion" in the plan documents, therefore, "[d]oes not compel the conclusion that the administrator does *not* have discretion." *Id.* at 637 (citing *Herzberger v. Standard Ins. Co*., 205 F.3d 327, 331 (7th Cir. 2000)).

Although the "Allocation of Authority" provision of the Group Policy does not use the word "discretion," it contains functionally equivalent terms that convey the same meaning as "discretion." The Seventh Circuit has held that the exact same Allocation of Authority provision contained in another Standard Group Policy was sufficient to confer Standard with discretionary authority. See *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 619 (7th Cir. 2008) ("The Standard plan's language unambiguously communicates the message that payment of benefits is subject to Standard's discretion.").

Undeterred by *Gutta*, Black nevertheless insists that the Allocation of Authority provision merely identifies the entity responsible for deciding disability claims, as in *Woods v. Prudential Ins. Co. of America*, 528 F.3d 320 (4th Cir. 2008). (Pl. App. Br., pg. 13).[9] The plan in *Woods* stated that disability claims are "determined by Prudential," and that claimants are eligible for benefits "when Prudential determines." *Id.* at 322.

Unlike the plan in *Woods*, the Allocation of Authority provision in Standard's Group Policy confers broad discretionary powers upon Standard. Standard has the "*full and exclusive authority*" to "*resolve all questions*" regarding the Group Policy's administration, interpretation, and application. Standard's authority includes the "*full and exclusive authority…to interpret* the

[9] Citations to "Pl. App. Br., pg. _" are to the corresponding page of the "Brief and Appendix for Plaintiff-Appellant."

Group Policy and *resolve all questions* arising in the administration, interpretation, and application of the Group Policy." Standard has the "*right to establish and enforce rules and procedures*," the "*right to resolve all matters* when a review has been requested," and the "*right to determine*" the "*sufficiency* and the *amount* of information" that Standard may reasonably require to determine a participant's "entitlement to benefits." (R. 48: Def. LR56, ¶ 5) (emphasis added). This language is descriptive of Standard's broad discretionary powers, consistent with the disclosure requirements of *Diaz* and *Herzberger*.

Because the "Allocation of Authority" provision clearly states that Standard has the full and exclusive authority to resolve all questions regarding the Group Policy's administration, interpretation, and application, including the final authority to decide the amount and sufficiency of the evidence submitted, Standard has discretionary authority. *Gutta*, 530 F.3d at 619.

## III. Standard's Benefit Decision Reflects A Reasonable And Permissible Choice Among Conflicting Medical Opinions.

The medical experts clearly disagree about Black's medical prognosis. When Black vigorously pursued another five-year term as executive director in the fall of 2002, her treating physicians, Drs. Slosky and Griffin, opined that Black's blood pressure reacts to the extraordinary stress of harassment and verbal abuse. One year later, after Black's tenure as executive director was over and she decided to pursue a disability claim, Drs. Slosky and Griffin suddenly changed their assessment and opined that Black's blood pressure reacts to normal occupational stress and that she should cease working.

On the other hand, the physicians consulted by Standard, Drs. Williamson, Floten, Kleikamp, Fraback and Gwinnell, opined that Black's descending aortic aneurysm was stable and clinically unaffected by occupational stress. In their medical judgment, Black could

continue to perform her occupational duties without significant risk to her health, while maintaining adequate blood pressure control with medication.

In the face of conflicting medical opinions, the arbitrary and capricious standard of review leaves questions of medical judgment to the discretion of the administrator. See *Semien v. Life Ins. Co. of North America*, 436 F.3d 805, 812 (7th Cir.), *cert. denied*, 549 U.S. 942 (2006) ([U]nder the arbitrary and capricious standard, neither this Court, nor the district court, will attempt to make a determination between competing expert opinions."). It is reasonable for an administrator to rely on the opinions of qualified and informed consulting physicians who review the medical file. *Davis v. Unum Life Ins. Co. of America*, 444 F.3d 569, 577 (7th Cir.), *cert. denied*, 549 U.S. 884 (2006). Standard properly exercised its discretionary authority by relying on the medical opinions of its consulting physicians over the contrary medical opinions of Black's treating physicians. Standard's decision to decline Black's disability claim reflects a reasonable and permissible choice among conflicting medical opinions.

**A. Black and her physicians provided inconsistent information regarding the impact of occupational stress on Black's aortic condition.**

An administrator is not required to explain why it chooses to credit the reliable opinions of consulting physicians over the opinions of the claimant's treating physicians. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003). Nevertheless, Standard legitimately questioned Black's claim that the stress of her regular occupational duties presented a life-threatening risk to her health.

The administrative record reflects a pattern in which Black tailored her medical restrictions in order to accommodate her personal ambitions. When she engaged in intense contract negotiations for another term as executive director in the fall of 2002, Black proclaimed that her medical condition was unaffected by normal occupational stress. At that time, Black

emphasized the stress of harassment and verbal abuse as the primary risk to her health. As stated by Black in her December 2, 2002 letter to MWF's counsel, Mike Kelly:

> As you and the board have known for two years, I have a serious possibly life threatening illness that allows me to be *fully functional* at this time, but which is reactive to stress, *not the day-to-day operational kind*, but the unnecessary stress that comes from degrading, disparaging and harassing conduct like I have experienced and am experiencing from you and certain volunteer management.

(R. 48: Def. LR56, ¶ 19) (emphasis added).

Yet in August 2003—just one week after learning that her tenure as executive director was over—Black claimed that occupational stress presented a life threatening risk to her health. Black's about-face in August 2003 was medically inexplicable. Why was normal occupational stress medically acceptable in the fall of 2002, but life-threatening in August 2003? Nothing changed in Black's medical condition to warrant this dramatic shift in position. Black's descending thoracic aorta remained "asymptomatic," "stable" and unchanged at 5.0 cm, according to the clinical findings of Drs. Slosky and Griffin. In fact, Black's cardiac condition improved between December 2002 and July 2003, despite the extraordinary stress of her contract negotiations and deteriorating relationship with the board of directors. Indeed, on July 3, 2003, Dr. Slosky opined that "[f]rom a cardiac standpoint, I feel that we have finally achieved some stability[.]" (R. 48: Def. LR56, ¶ 44). Dr. Slosky recorded Black's blood pressure at 122/78, which is a *completely normal* blood pressure reading. (R. 48: Def. LR56, ¶ 44). Notably, Dr. Slosky's July 3, 2003 examination occurred during the peak of Summerfest, when Black was at her busiest and most stressed.[10]

In August 2003, after MWF's personnel committee voted not to renew her employment contract, Black bemoaned the potentially deadly consequences of exposure to the stress of media

[10] Summerfest ran from June 26, 2003 to July 6, 2003. See www.summerfest.com/media/newsreleases.php?year=2003 (Oct. 15, 2006). See also http://www.last.fm/event/173652 (Mar. 5, 2009).

attention. (R. 48: Def. LR56, ¶ 35). Inconsistently, when Black received an offer to host a local television show in the spring of 2004, the stress of media attention suddenly was not so deadly. Black accepted the role of co-host on "The Don & Bo Show," which was taped over a ten-week period before a live audience. (R. 48: Def. LR56, ¶ 17).

Drs. Slosky and Griffin, too, tailored their medical opinions to accommodate Black's personal agenda. When Black was engaged in heated contract negotiations in the fall of 2002, Drs. Slosky and Griffin submitted letters to her attorney focusing on the health risks of harassment and verbal abuse, specifically for use during the negotiations. (R. 48: Def. LR56, ¶¶ 21-22). In their letters, Drs. Slosky and Griffin never opined or even suggested that Black's medical condition was disabling. If normal occupational stress presented a life-threatening risk to Black's health, surely her treating physicians would have said so explicitly in their letters to Black's attorney. Instead, they facilitated and endorsed Black's bid for another term as executive director by confining their medical restrictions to the extraordinary stress of harassment and abuse (which under the Plan's definition of "disability" are not "material duties" of Black's regular occupation).

After Black filed her disability claim on August 6, 2003, however, Drs. Slosky and Griffin changed their assessment and endorsed Black's disability claim. They submitted letters to Standard stating that Black must stop working in order to control her hypertension, which is inconsistent with their letters to Black's attorney in the fall of 2002 written to assist Black's contract negotiations.

Moreover, Drs. Slosky's and Griffin's statements in their letters to Standard contradicted their clinical findings in Black's medical records. According to Dr. Slosky's medical chart, on May 27, 2004, Black's blood pressure was completely normal (at 130/74). (R. 48: Def. LR56, ¶

49). Dr. Slosky noted in his medical chart that Black's blood pressure was under reasonable control with medication: "I feel that we have finally achieved reasonable blood pressure control with her current medical regimen." (R. 48: Def. LR56, ¶ 49). But two months later, in a July 22, 2004 letter sent to Standard (and without further clinical examination of Black), Dr. Slosky opined that Black's blood pressure control "remains less than ideal" (which itself is hardly a resounding endorsement of disability). (R. 48: Def. LR56, ¶ 50). In a transcribed interview with Black's attorney on July 28, 2004, Dr. Griffin stated that Black's blood pressure "has not been adequately controlled" with medication, which directly contradicted Dr. Slosky's clinical findings on May 27, 2004 of "reasonable blood pressure control." (R. 48: Def. LR56, ¶ 39).

Black and her physicians also exaggerated the side effects of her blood pressure medication (Labetalol, a beta-blocker). In a July 22, 2004 letter to Standard, Dr. Slosky opined that Black's medication "*may* have a role in Ms. Black's disability since the medications cause fatigue…." (R. 48: Def. LR56, ¶ 50) (emphasis added). Dr. Griffin, too, in his transcribed interview with Black's attorney, suggested that Black's medication might cause fatigue. (R. 48: Def. LR56, ¶ 39). Black enlisted the help of family members (her husband, son and daughter) and two friends (a businesswoman who lives in Massachusetts, and a well-connected lawyer who lives in Washington, D.C.) to write letters to Standard describing Black as extremely fatigued such that she could barely climb a flight of stairs. (R. 50 & 51: STND655-00675 to 684).

But Black's medical records fail to document any significant difficulty with chronic fatigue. To the contrary, Dr. Slosky, in his medical records, stated that Black does not experience any ongoing symptoms of fatigue, based on his clinical examinations of her on July 11, 2002, July 3, 2003, October 29, 2003, and April 8, 2004. (R. 48: Def. LR56, ¶¶ 43, 44, 46, 49). Nor is there any mention in Dr. Griffin's medical records of ongoing problems with fatigue.

Standard had legitimate reasons to question the reliability of Dr. Slosky's and Dr. Griffin's opinion of disability. The propensity for treating physicians to act as disability advocates is well known and a proper consideration when evaluating a disability applicant's claim for benefits. See *Davis*, 444 F.3d at 578 (observing that the treating physician acted "more as an advocate than a doctor rendering objective opinions"). Standard, therefore, acted prudently by obtaining the advice of independent consulting physicians, including physicians with expertise in cardiology and thoracic surgery. These independent physicians, in turn, concluded that the medical evidence failed to establish that Black was disabled.

**B. Standard properly considered occupational stress in concluding that Black's aortic condition was not disabling.**

Black contends that Standard disregarded important aspects of her disability claim. She argues that Standard failed to consider the impact of occupational stress on her aortic aneurysm, disregarded evidence of fatigue and impaired cognitive functioning, and improperly relied on the opinions of consulting physicians who performed a selective review of the file. (Pl. App. Br., pgs. 18, 20, 21, 24). Black argues that Standard performed the same type of flawed decision-making that the courts found to be arbitrary and capricious in *Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3rd Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004) and *Saliamonas v. CNA, Inc.*, 127 F.Supp.2d 997 (N.D. Ill. 2001).

The administrators in *Lasser* and *Saliamonas* disregarded both the treating and consulting physicians' consensus opinion and determined that even a high risk of medical complications cannot be disabling until those complications actually occur. *Saliamonas*, 127 F.Supp.2d at 1001 ("[T]o suggest, as CNA does, that a permanent heart condition that may be aggravated by stress can only rise to the level of a disability when and if the insured suffers a heart attack is

unreasonable"); *Lasser*, 344 F.3d at 391 ("[A]ll the evaluating physicians…agreed that Dr. Lasser's heart condition precludes him from safely performing" the duties of his occupation).

But Standard did not reject the idea that the risk of disability itself might be disabling. Standard acknowledged that whether the risk of future disability constitutes a present disability depends on the probability of that risk's occurrence. Standard properly assessed this risk by seeking the advice of independent physicians, including two cardiac surgeons (Drs. Williamson and Floten), who examined the historical impact of occupational stress on Black's blood pressure and descending aortic aneurysm.

Dr. Williamson, in his March 23, 2004 medical report, expressly acknowledged his consideration of the potential impact of stress and hypertension on Black's aortic aneurysm: "I have considered stress and blood pressure control in formulating an opinion regarding Ms. Black's risk for aneurysm rupture." (R. 48: Def. LR56, ¶ 87). Dr. Williamson concluded that "blood pressure within the range" reported by Black, "stressful work conditions" or "anxiety disorder," in his medical opinion, would not increase the "risk of rupture of thoracic aortic aneurysms such as Ms. Black's." (R. 48: Def. LR56, ¶ 87).

Dr. Floten also considered the relationship between stress and hypertension in evaluating Black's aortic aneurysm. He concluded that Black's aortic condition has been unaffected by occupational stress: "I do not believe her condition has been affected by the stress of her job. The descending aorta has not enlarged significantly in the last three years." (R. 48: Def. LR56, ¶¶ 89 – 92).

Dr. Kleikamp, in his December 10, 2003 medical report, also considered the impact of occupational stress on the progression of aortic aneurysms. Based on the clinical findings and

objective MRI evidence, Dr. Kleikamp concluded that Black's thoracic aneurysm has been "stable" and "asymptomatic" since March 2001. (R. 50 & 51: STND655-00321 - 322).

Standard specifically informed Black, in its January 28, 2005 final determination letter, that it considered occupational stress and hypertension in concluding that she was not at serious medical risk of an aortic rupture. (R. 50 & 51: STND655-01113 - 1115). Black's accusation that Standard failed to consider the risk of disability and the impact of occupational stress on her aortic aneurysm, therefore, is directly refuted by the medical reports of Drs. Williamson, Floten and Kleikamp, and by Standard's January 28, 2005 final determination letter.

Black argues that Dr. Williamson's opinion was flawed, because he purportedly based his opinion on a "mistaken belief" that Black's aortic aneurysm had not changed in size since it was first diagnosed in 2001. (Pl. App. Br., pg. 24). Yet Dr. Williamson specifically considered the minimal 0.3 cm increase in the diameter of Black's descending aorta and concluded that this increase was clinically insignificant. As stated by Dr. Williamson:

> [T]he area of aorta in question is the descending thoracic aorta and its diameters have remained stable since [the] initial MRI of February 2001. The diameters are as follows:
>
> 1) In February 2001: 4.7 cm.
> 2) In November 2001: 4.7 cm.
> 3) In May 2002: 5.0 cm.
> 4) October 31, 2002: 5.0 cm.
> 5) September 15, 2003: 5.0 cm.
>
> These studies are all magnetic resonance imaging studies performed at [the] Cleveland Clinic. *These studies do not show significant change in the descending aortic diameter*.

(R. 48: Def. LR56, ¶ 85) (emphasis added). Dr. Williamson concluded that Black could perform her occupational duties "expecting minimal impact on the growth rate or rupture potential of the existing descending thoracic aortic aneurysm." (R. 48: Def. LR56, ¶ 82).

Black portrays the 0.3 cm increase in the diameter of her descending aorta as objective proof that occupational stress aggravated her aortic aneurysm. (Pl. App. Br., pg. 22). She laments the "significant risk of sudden death" and "immediate life threatening" danger that her descending aortic aneurysm would rupture if she continued working. (Pl. App. Br., pgs. 18-19). She argues that it was arbitrary and capricious for Standard to conclude that her aortic condition was stable, when the MRI scan demonstrated otherwise.

The May 2002 MRI report describes Black's aortic diameter as only "*mildly* increased" at 5.0 cm., which hardly qualifies as objective medical evidence of a life threatening change in Black's medical condition. (R. 48: Def. LR56, ¶ 30) (emphasis added). Moreover, MRI scans obtained on May 13, 2002, October 31, 2002, February 24, 2003, September 15, 2003 and April 30, 2004 confirm that Black's descending thoracic aorta remained "stable" and "unchanged." (R. 48: Def. LR56, ¶¶ 30-33, 37-38). If the May 2002 MRI somehow evidenced a substantial increase in the rupture potential of Black's descending thoracic aorta, one would expect to find mention of that "significant life-threatening risk" in her contemporaneous medical records. But neither Dr. Griffin nor Dr. Slosky, in their medical chart, comment about any concern over an increased potential for rupture. Dr. Slosky obviously agreed that Black's cardiac condition was stable, because in his July 3, 2003 medical chart, he states: "[f]rom a cardiac standpoint, I feel that we finally achieved some stability…." (R. 48: Def. LR56, ¶ 44).

Black would have the court believe that her aortic aneurysm teeters on the limits of bursting. Laypersons lack medical expertise to evaluate whether a descending aortic aneurysm like Black's, at 5.0 cm, represents an immediate life threatening risk. Drs. Williamson, Floten and Kleikamp, on the other hand, have a studied understanding of the minimal risks associated

with Black's medical condition, and it was reasonable for Standard to rely on their medical judgment.

Statistics published by the Society of Thoracic Surgeons establish that descending thoracic aneurysms with a diameter between 5.0 cm. and 6.0 cm. have only a 1.7% annual risk of rupture and a 2.5% annual risk of dissection (or leakage), based on empirical studies performed by the Yale University School of Medicine. See John A. Elefteriades, M.D., *Natural History of Thoracic Aortic Aneurysms: Indications for Surgery, and Surgical Versus Nonsurgical Risks*, ANNALS OF THORACIC SURGERY, vol. 74, pg. 1877-1880 (2002). (R. 55-1 Ex. A). The Yale University study identifies 7.0 cm. as the "hinge point" in which the risks associated with descending thoracic aneurysms dramatically increase. A 1.7% risk of rupture and a 2.5 % risk of dissection are far from the totally disabling "significant risk of sudden death" that Black portrays in her appellate brief.

The objective medical evidence demonstrates that Black's aortic condition was "stable" and that the risk of rupture was minimal at best. One can understand that Black, having been rebuffed in her efforts to secure another five-year term as executive director, justifiably might choose to remain out of the work force and retire to her second home in Arizona. One also can understand that Drs. Griffin and Slosky would support Black's decision to retire, because less stress obviously is better for anyone's wellbeing. However, it is improper for Black to convert her personal decision to cease working (after losing her job) into a disability claim necessitated by life or death medical circumstances.

The expert opinions of Drs. Williamson, Floten and Kleikamp provide Standard with a reasonable medical basis to decline Black's disability claim. No more is required to withstand judicial review under the "arbitrary and capricious" standard. See *Davis*, 444 F.3d at 577 ("It is

reasonable, therefore, for an administrator to rely on its doctors' assessments of the file and to save the plan the financial burden of conducting repetitive tests and examinations."); *Herman v. Central States, Se. & Sw. Areas Pension Fund*, 423 F.3d 684, 692-93 (7th Cir. 2005) ("[T]his court will not substitute the conclusion it would have reached for the decision of the administrator, as long as the administrator makes an informed judgment and articulates an explanation for it that is satisfactory in light of the relevant facts").

### C. Standard properly considered Black's claim of fatigue and diminished cognitive functioning.

When Black initially submitted her disability claim to Standard, she identified only stress, hypertension and her aortic aneurysm as her basis for seeking disability benefits. During the administrative appeal, however, Black's attorney added "fatigue" and "cognitive impairments" to the mix of allegedly disabling medical conditions. Black speculates that these new symptoms might be side effects from her blood pressure medication, or more nefariously, indicative of brain damage sustained during her March 2001 surgery. (Pl. App. Br., pg. 28). Black endeavored to support this aspect of her claim with letters from her husband and children describing her as extremely fatigued and unable to concentrate, and with the results of neuropsychological testing performed by Thomas Hammeke on August 20, 2004.

In her appellate brief, Black argues that Standard failed to consider fatigue and cognitive difficulties, and "simply disregarded" letters from her family and Thomas Hammeke's neuropsychological testing. (Pl. App. Br., pg. 28). But Standard's consulting psychiatrist, Esther Gwinnell, M.D., clearly considered Black's claim of fatigue and cognitive difficulties, and expressly said so in her medical review report. Dr. Gwinnell opined that the letters submitted by Black's family, which described extreme symptoms of fatigue, were inconsistent

with the contemporaneous medical records of Black's treating physicians. As stated by Dr. Gwinnell:

> The difficulty that I have is that the letters from Ms. Black's children strongly support the presence of psychiatric difficulties, cognitive difficulties, and profound fatigue from her surgical date [March 2001] through the most recent information and beyond. However, this is not in any way documented by the concurrently maintained medical information. Dr. Slosky specifically notes the lack of fatigue, fever, weight change, cognitive difficulties, or other neurological physiological findings that would be consistent with either organic or psychiatric illness.

(R. 48: Def. LR56, ¶ 98-99).

As Dr. Gwinnell astutely noted, the medical records of Black's Milwaukee cardiologist, Dr. Slosky, specifically state that Black has not experienced symptoms of chronic fatigue, based on his clinical examinations on July 11, 2002, July 3, 2003, October 29, 2003, and January 28, 2004. (R. 48: Def. LR56, ¶¶ 43, 44, 46, 49; R. 50 & 51: STND665-00838). Only on April 8, 2004 does Dr. Slosky, for the first time, note any symptoms of fatigue. Obviously fatigue was not an enduring problem for Black, because one month later, on May 27, 2004, Dr. Slosky noted that Black has *no symptoms* of fatigue. (R. 50 & 51: STND655-00842). Nor is there mention of ongoing fatigue in any of Dr. Griffin's medical records.

The session notes of Black's treating psychiatrist, Dr. Deeken, also fail to support Black's claim that she was disabled by fatigue or concentration problems. Rather, Dr. Deeken's counseling focused on Black's anger and disappointment over the loss of her job and the denial of her disability claim. (R. 48: Def. LR56, ¶¶ 53-55). Standard's consulting psychiatrist, Dr. Gwinnell, observed that "at no time does Dr. Deeken report memory or concentration problems, nor does he report complaints of significant levels of fatigue on Ms. Black's behalf." (R. 50 & 51: STND655-00923).

Black's argument that Standard "simply disregarded" Thomas Hammeke's neuropsychological testing also is completely unfounded. Even Thomas Hammeke failed to find that Black has a disabling cognitive impairment. To the contrary, he found that Black performed in the average to superior range in tests of intellectual and executive functioning. Black fared less well (50th percentile) in assembling block constructions, and her figure drawings purportedly showed "mild configural distortions." (R. 48: Def. LR56, ¶¶ 57-58). Thomas Hammeke concluded: "Overall the skill deficits are relatively mild, though undoubtedly contribute to her frustration." (R. 48: Def. LR56, ¶ 58; R. 50 & 51: STND655-00705).

Moreover, Thomas Hammeke's August 2004 testing relate to a period in which Black was no longer insured under the Plan. (R. 50 & 51: STND655-01114). Thomas Hammeke's findings reflect Black's cognitive abilities as of *August 2004*, but Black's coverage under the Plan terminated on December 31, 2003.[11] Standard properly considered the timeliness of the neuropsychological testing as one aspect of its evaluation of Black's disability claim. See, e.g., *Kay v. Consolidated Route Plan 510,* No. 04 C 6562, 2005 WL 2978946, at *6 (N.D. Ill. Nov. 3, 2005) (holding that the plaintiff failed to satisfy her burden of proof with a physician's report proffered 6 months after her coverage ended); *Kubica v. Washington National Ins. Co.*, No. 99 C 6250, 2000 WL 1231554, at *4 (N.D. Ill., Aug. 28, 2000) ("disability must begin while the insured is still covered under the policy").

Black tries to "back-date" the onset of her alleged cognitive difficulties based on speculation by Thomas Hammeke that she may have sustained brain damage while on a heart/lung machine during the March 2001 surgery (a condition known as "post-pump encephalopathy"). (Pl. App. Br., pg. 28). Mr. Hammeke is not a physician and he clearly has

[11] The Group Policy provides that an employee's coverage under the Group Policy ends upon the termination of Employment. (R. 48: Def. LR56, ¶ 2). Black's coverage under the Plan ended, therefore, on December 31, 2003 at the latest, when her employment contract expired.

stepped outside of his area of expertise by offering a medical diagnosis. There is absolutely no mention of post-pump encephalopathy or brain damage in any of the medical records of Black's treating physicians, including the records of Dr. Lytle, who performed the March 2001 surgery. In fact, Black's neurologist, Dr. Maas, opined on August 31, 2004 that Black's neurological examination was *normal*. (R. 48: Def. LR56, ¶ 59). Thomas Hammeke's speculation about surgery related brain damage is completely unsupported by the contemporaneous medical records of Black's treating physicians and undercuts the credibility of Mr. Hammeke's opinions.

Standard consulted both Dr. Gwinnell and Dr. Kleikamp, who specifically addressed the neuropsychological testing in their medical review reports. Dr. Kleikamp opined that the neuropsychological testing "is consistent with very mild neuropsychiatric changes, but in general, the claimant is functioning at average to above average levels." (R. 50 & 51: STND655-00938). Dr. Kleikamp concluded that Black was able to perform the duties of an executive director and that she was not disabled. (R. 50 & 51: STND655-00937 - 938). Dr. Gwinnell opined that Black "scored in the average to above average range" in tests of intellectual functioning. (R. 48: Def. LR56, ¶ 100). Dr. Gwinnell concluded that "the documentation does not in fact support the presence of cognitive deficits at the cease work date [August 6, 2003] or at anytime until August of 2004." (R. 50 & 51: STND655-00922).

Standard specifically informed Black, in the January 28, 2005 final determination letter, of its evaluation of her claim of fatigue and cognitive impairments, and of its reliance on the medical opinions of Drs. Gwinnell and Kleikamp (as well as of Drs. Williamson and Floten) that she was not disabled while insured under the Plan. (R. 50 & 51: STND655-01114). Standard reasonably concluded that Black's claims of extreme fatigue and cognitive impairments were

inconsistent with the contemporaneous medical records which specifically deny the presence of chronic fatigue or cognitive difficulties.

## IV. A Structural Conflict Of Interest Does Not Transform Standard's Reasonable Benefit Decision Into An Unreasonable Benefit Decision.

Black argues that the court should diminish the degree of deference accorded to Standard's benefit decision, in order to compensate for Standard's structural conflict of interest as the Plan's insurer and claims administrator. Black contends that when an administrator has a structural conflict of interest, the administrator's benefit decision should be subject to heightened judicial scrutiny, citing as authority the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008). (Pl. App. Br., pgs. 14, 33).

In *Glenn*, the Supreme Court held that when an administrator functions in the dual capacity as arbiter of claims and payor of benefits, the administrator operates under a structural conflict of interest. *Glenn*, 128 S.Ct. at 2348-2349. A conflict of interest is one of many factors for courts to consider in evaluating the reasonableness of an administrator's decision. *Glenn*, 128 S.Ct. at 2349-2350. Of course, *Firestone* established long ago that if an administrator operates under a conflict of interest, "that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone Tire & Rubber Co.*, 489 U.S. at 115 (quoting *Restatement (Second) of Trusts*, §187 Comment d (1959)). The Supreme Court in *Glenn* established nothing new in that regard. Consistent with *Firestone*, the *Glenn* Court held that an administrator's structural conflict is a factor in determining whether the administrator's decision was arbitrary or capricious. The significance of that conflict may diminish (even to the vanishing point) depending upon the particular facts of the case. *Glenn*, 128 S.Ct. at 2350.

In essentially every ERISA benefit dispute, the administrator has a structural conflict, because the vast majority of employee benefit plans are employer-funded and administered,

insurer-funded and administered, or some combination thereof. *Glenn* refused to "overturn *Firestone* by adopting a rule that in practice could bring about near universal review by judges *de novo*—*i.e.*, without deference—of the lion's share of ERISA plan claims denials." *Id.* "Benefit decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts—which themselves vary in kind and degree of seriousness—for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review." *Id.* at 2351.

Black argues that the *Glenn* Court's citation to *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) heralds a new era in which courts are to "probe" the benefit decisions of ERISA administrators with heightened skepticism bordering on *de novo* review, though Black stops short of calling this new heightened standard "*de novo* review." She quotes a lengthy passage from *Universal Camera Corp.*—a passage that was not quoted in *Glenn*—which instructs courts to "now assume more responsibility for the reasonableness and fairness of Labor Board decisions…." Black wants the court to substitute the term "administrator" for "Labor Board" and apply the holding of *Universal Camera Corp.* as though it were an ERISA disability case.

This is a misleading argument by Black. *Glenn* cites *Universal Camera Corp.* only as an example of a Supreme Court decision that refused to adopt a one-size-fits-all approach to be mechanically applied by district courts. The *Glenn* Court noted that *Universal Camera Corp.* "concluded, as we do now, that the '[w]ant of certainty' in judicial standards 'partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review.'" *Glenn*, 128 S.Ct. at 2352 (quoting *Universal Camera Corp.*, 340 U.S. at 477). Nothing in *Glenn* commends district courts to forsake well established principles

of deferential judicial review and adjudicate ERISA disputes as though reviewing a decision of the Labor Board. See *Gutta v. Standard Select Trust Ins. Plans*, No. 06-3708, 2008 WL 3271414 (7th Cir. Aug. 8, 2008) ("*Glenn* reaffirmed the rules for deciding whether a *de novo* or abuse-of-discretion standard of review should be applied, citing [*Firestone*]. That is the framework we applied when we decided that the deferential abuse-of-discretion (or arbitrary and capricious) standard was proper for this case."). Accord *Wakkinen v. Unum Life Ins. Co. of America*, 531 F.3d 575, 581 (8th Cir. 2008) ("[T]he existence of a conflict did not lead the Court [in *Glenn*] to announce a change in the standard of review.").

*Glenn*, therefore, does not alter the arbitrary and capricious standard of review, or mandate more probing judicial review. Rather, *Glenn* is a continuation of the law established in *Firestone* and is consistent with Seventh Circuit authority. See, e.g., *Hess v. Reg-Ellen Machine Tool Corp.*, 423 F.3d 653, 659 (7th Cir. 2005); *O'Reilly v. Hartford Life & Accident Ins. Co.*, 272 F.3d 955, 960 (7th Cir. 2001).

Black argues that Standard's reliance on the medical opinions of consulting physicians, which she contends were "outweighed" by the opinions of her treating physicians, demonstrates that a conflict of interest tangibly influenced Standard's decision-making. She claims that the court should give "great importance" to Standard's structural conflict in evaluating the reasonableness of Standard's disability determination. (Pl. App. Br., pgs. 31-32).

The Seventh Circuit rejected this same argument in *Davis*, 444 F.3d at 576-577. *Davis* holds that it is *reasonable* for an administrator to rely on its consulting physician's review of the claimant's medical file. ERISA administrators should be encouraged to consult with medical experts, not punished for doing so as Black would have it. Pursuant to *Davis*, Standard's

reliance on the opinions of highly qualified and fully informed consulting physicians evidences unbiased decision-making, and not evidence of a conflict of interest.[12]

Finally, Black argues that the failure to give significant weight to the disability decision of the Social Security Administration ("SSA"), favorable to Black, evidences a conflict of interest worthy of "great importance" under *Glenn*. (Pl. App. Br., pg. 32). It appears that the SSA approved Black's disability claim solely on psychiatric grounds, according to a medical record review performed by William Merrick, Ph.D., an SSA retained psychologist, wherein Dr. Merrick cryptically notes "depressive symptoms." Dr. Merrick identified Black's functional limitations simply by checking-off boxes on a psychiatric review and functional capacity form, without any explanation whatsoever for his conclusions. (R. 50 & 51: STND655-00882). If an ERISA administrator decided disability claims by checking-off boxes on a form, the administrator's determination would be arbitrary and capricious. Standard clearly did not act unreasonably in accepting the well-reasoned medical opinions of Drs. Williamson, Floten, Kleikamp and Gwinnell over the superficial check-a-box form of the SSA's reviewing psychologist.

The SSA, moreover, failed to confer with a cardiologist or, for that matter, with *any physician* in order to evaluate the risks associated with Black's aortic aneurysm. The SSA did not have the benefit of the medical opinions of Drs. Williamson, Floten, Kleikamp and Gwinnell, who opined that Black may perform her occupational duties with minimal risk to her descending aortic aneurysm and that she does not experience chronic fatigue or difficulties concentrating.

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[12] Black wants the court to disregard the medical opinions of Standard's consulting physicians as inadmissible hearsay. An ERISA administrator, however, is not a court of law and is not bound by federal rules of evidence. *Speciale v. Blue Cross and Blue Shield Ass'n*, 538 F.3d 615, 622 n. 4 (7th Cir. 2008) (citing *Karr v. Nat'l Asbestos Workers Pension Fund*, 150 F.3d 812, 814 (7th Cir. 1998)). In evaluating the reasonableness of the administrator's determination, therefore, it is appropriate for the court to consider all the evidence contained in the administrative record, including the opinions of consulting physicians. *Id.*

Rather, the SSA merely accepted the *pro hoc* conclusion of disability proffered by Black's treating physicians, without any indication of critical analysis or physician review.

The SSA also lacked a complete picture of the events preceding Black's decision to cease working. The SSA, for example, was unaware that Black had pursued another five-year term as executive director, and that she filed her disability claim *just one week* after MWF's personnel committee voted to terminate her employment contract. Conspicuously absent from the Social Security file is Black's December 2, 2002 letter to MWF's counsel, Mike Kelly, in which Black acknowledged that her medical condition leaves her "fully functional" and is not reactive to "day-to-day operational" stress. (R. 48: Def. LR56, ¶ 19). Standard explained all of this to Black in the January 28, 2005 final determination letter. (R. 50 & 51: STND655-01113).

Perhaps the Social Security evaluation would have been more searching if the SSA had obtained the information provided to Standard by MWF, or if the SSA had considered the medical reports of Drs. Williamson, Floten, Kleikamp and Gwinnell. But as it was, the SSA's evaluation was far from compelling; it was superficial and unconvincing.

## CONCLUSION

Standard obviously did not dismiss Black's claim out of hand on the basis that serious medical risks can never be disabling, nor did Standard disregard important evidence. To the contrary, Standard carefully and critically examined the medical evidence and consulted highly qualified medical professionals who did the same. Standard reasonably determined, based on the clinical evidence and the opinions of medical experts, that Black was at minimal medical risk of rupturing her descending aortic aneurysm, and that she was not disabled by fatigue or cognitive difficulties. The district court properly applied the arbitrary and capricious standard of review and correctly held that Standard's decision to decline Black's disability claim was reasonable.

See *Semien*, 436 F.3d at 812 ("[u]nder an arbitrary and capricious review, neither this Court, nor the district court, will attempt to make a determination between competing expert opinions"). Accordingly, the decision of the district court should be upheld.

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## CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for defendant / appellee, Long Term Disability Insurance, hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(C), that the Brief of the defendant / appellee complies with the type-volume provisions of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 10,424 words and 858 lines excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In addition, this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman font in 12 point size, with footnotes in 11 point size.

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**CERTIFICATE OF SERVICE**

The undersigned counsel of record hereby certifies that two (2) copies of the Brief of the defendant / appellee, together with one (1) copy in digital format, were served upon counsel for the plaintiff / appellant, Elizabeth Black, by depositing same in the U.S. Mail, postage pre-paid at 39 S. LaSalle St., Chicago Illinois 60603 addressed to Mr. Mark DeBofsky, Daley, DeBofsky & Bryant, 55 W. Monroe St., Suite 2440, Chicago, Illinois 60603, before the hour of 5:00 p.m. on this 6th day of March 2009.

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## CIRCUIT RULE 31(e) CERTIFICATION

The undersigned, counsel of record for defendant / appellee, Long Term Disability Insurance, hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the Brief of defendant / appellee, and all of the appendix items that are available in non-scanned PDF format.

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